Supreme Court, U.S.
FILED

04 1130 JAN 10 2005

OFFICE OF THE CLERK

Case No:

==========

In the

Supreme Court of the United States

THOMAS SHARPE, M.D.

Petitioner

v.

CHARLES P. CONOLE; et al

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS SHARPE, M.D.
PETITIONER PRO SE
P.O.B. 127
Gouverneur, New York 13642
Tel: (315) 287-7553

PUBLISHER'S NOTE:

PAGE(S) i, ii MISSING IN ORIGINAL DOCUMENT

Table of Contents.

Question Presented	i
Parties to the Action	ii
Table of Contents	iii
Opinions and Orders below	iv - v
Jurisdiction	v
Statement of the Case	1 - 7
Reasons for granting the Petition	7
Appendix	
Decision of the US Court of Appeals Second Circuit, October 15, 2004	1 - 6
Decision and Order US District Court, Northern District of New York December 7, 2000	7 -15

TABLE OF AUTHORITIES.

18 U.S.C.S. # 248 FACE	Passim
New York Penal Law 240.70	1
Scheidler v. Nat'l Org. W. 537 U.S. 393	i
Norton v. Ashcroft 298 F3d. 547	i
US v. Vazquez 145 F. 3d 74	1
US v. Staples 511 U.S. 600	3
42 U.S.C.S. # 1983	v
DiBlasio v. Novello 344 F. 3d 292	7
Cert. Denied Novello v. DiBlasio	
2004 U.S. LEXIS 2770 (U.S. April 19, 2004	

OPINIONS AND ORDERS BELOW

The proceeding at the US District Court, Northern District of New York started on June 15, 1999 with filing the Complaint under 42 USCS 1983, and 18 USCS 248. The same time Barbara Storie filed a complaint against defendant -appellee Burkhart under 18 USCS 248 and Medical Malpractice. On August 7, 1999, the Hon. Thomas J. McAvoy dismissed all complaints sua sponte except those under FACE and directed filing of an Amended Complaint against all defendants under FACE. Petitioner's Amended Complaint was filed September 7, 1999. Barbara Storie since died.

The District Court dismissed the complaint against the state defendants on March 31, 2000, but the state defendants stayed in the case.

The District Court dismissed Petitioner's complaint upon failure to allege requisite intent on December 7, 2000. Notice of Appeal was filed January 3, 2001.

On March 22, 2001 the District Court granted leave to file an amanded appeal that included the state defendants. The state stayed in the action.

Appeal pending Petitioner filed a Rule 60 Motion at the District Court to vacate the judgment upon the ground that the defendants killed the first mother inflicting severe internal injuries and gas gangrene. The motion was denied and Petitioner joined the motion under Docket 01-9019.

On July 18, 2001 the defendants inflicted a second mother with the gas gangrene bacterium, Petitioner asked the defendants through the Court to diagnose and treat the mother.

Request denied, Petitioner filed a morion for injunction. The defendants placed the mother on an antithyroid medication that would have seriously injured and probably killed the mother and her baby. Petitioner took the mother out of the defendants' hands and referred her for proper tratment.

Defendant-Appelle Choate died December 23, 2003, Petitioner filed Suggestion of Death on the Record and Motion to Substitute Party. In the Motion for Substitution Petitioner set forth that Choate is not a state defendant and that Choate and Burkhart threatened Petitioner with inflicting lethal injury on Barbara Storie when Petitioner was forced to give up his license. The state did not appear on behalf of the administratrix of Choate's estate.

JURISDICTION.

The US Court of Appeals Second Circuit Decision was filed October 15, 2004.

This Court has Jurisdiction under 28 U.S.C. Section 1254(1)

STATEMENT OF THE CASE.

The District Court's reliance on New York Law did not survive on appeal. These references are disposed of by Second Circuit decision in U.S. v. Vazquez 145 F. 3d 1998 and New York Penal Law 240.70 both clear that state laws are preempted by FACE , and survive only if they enforce the same objective as FACE.

The question of the specific intent requires a factual approach. Petitioner is an Obstetrician/Gynecologist Certified by the American Board of Obstetrics and Gynecology and within this Petitioner is highly specialized in Adolescent Obstetrics and Gynecology.

Adolescent Obstetrics and Gynecology would require as basic requirements the ability to diagnose pregnancy of an adolescent, ability to offer an abortion if the patient so desires, ability to render prenatal care and delivery when desired, and offer referral for adoption if needed. Petitioner met these requirements and soon became very popular. Petitioner's practice nearly doubled after the first year, and then was showing an expected 50% yearly growth. Gouverneur had the highest incidence of adolescent pregnancies in New York State and this is how Petitioner- experienced in this field - got to the town and E.J. Noble Hospital through the National Health Corps.

The growth of the practice invited other reproductive care providers. Fausto Innamorati, M.D. an Ob/Gyn subspecialized in maternal-fetal medicine i.e. an expert in complicated pregnancy decided to join Petitioner and started to see patients in the office, regularly reviewed ultrasound reports, and

complicated cases, and filed an application to join the hospital staff as Petitioner's associate.

The growth of the practice to a great extent consisted of pregnant adolescents. These girls soon had a presence in the hospital. When the defendants broke up the maternity service 20 pregnant adolescents were waiting for delivery of their babies.

For most defendants adolescent pregnancy was not only not permissible, but simply not existing. The basis for a clash between the defendants and the pregnant adolescents was all set.

From here on the only difference in the defendant's intent and other FACE violators intent is that these defendants did not zero in on the girls seeking abortion. The subgroup opting for abortion was done away with it fast and quiet, and faded away avoiding conflict.

The problem broke out with the group heading for the delivery room. A highly visible, and ever growing group of pregnant children.

The defendants response was block and lock first with increasing administrative restrictions, later with increasing violence. The second obstetrician was placed under Petitioner's supervision, with nobody knowing except the state defendants. Petitioner's access to the maternity ward was blocked by the defendants and the defendants referred Petitioner's patients to the second obstetrician. Same time since the second obstetrician was non-compliant with the supervision by petitioner, the state defendants revoked his license.

Petitioner's patients were waiting for the other obstetrician and the babies started to die. Soon the hospital obstructed the entry of any pregnant woman for reproductive service.

Meanwhile the defendants stalked the pregnant adolescents. The letters the children wrote were intercepted their mothers were called in their homes and harassed, the children were threatened that they will be left alone when in labor. Defendants and their agents were continuously present in the foyer in front of Petitioner's office harassing pregnant women first only adolescents later all patients.

Petitioner and his staff and his patients were treated with scorn Petitioner's papers were repeatedly searched and seized. Defendant Leader acknowledged that while blocking petitioner's access to the maternity ward, Leader used petitioner's name as an expert witness in a medical malpractice case. Richard Aubry, M.D. of the State University and other State University Physicians gave Petitioner letters of recommendatios - to take his practice elsewhere. The Health Department wanted the same: to move Petitioner elsewhere. The same Aubry acknowledged that petitioner's statistics in the hospital were very good and his outcomes favorable. Yet he simply did not release those statistics to petitioner claiming those are compiled for the hospital. Defendant Leader when their way crossed with petitioner always - even today - laughed laud "ha-ha-ha, ha-ha-ha, joke!"

When petitioner went to court, defendants filed a motion to appoint a guardian ad litem for petitioner.

This Court traditionally has a factual approach to intent. U.S. v. Staples 511 U.S. 600.

Connecting the dots we can see the defendants' intent: to make the treatment of pregnant adolescent girls impossible in the hospital first by a series of malicious mischiefs belittling and ridiculing the children and their care providers, and later a series of ever wilder violent acts.

Defendant Burkhart seized the chart of a mother when her baby was transferred from the pediatrician who received the baby. The baby died September 12, 1995. On the hearing in the Health Department on June 11, 1997 Burkhart asserted the things petitioner Innamorati and the sonographer talked about did not interest him.

Defendant-Appellee Choate and Conole seized the records of Barbara Storie, mentioned above, a pregnant diabetic and hypertensive patient. Burkhart prevented reproductive care for Storie and both her hypertension and diabetes became critical This assault was so violent that US Senator Alfonse D'Amato intervened in the Health Department, to obtain proper care for Storie. This time Burkhart and accomplices in the Health Department threatened Petitioner that if he does not give up his license they will continue to obstruct Storie's care. This is how the Defendant-Appellees obtained their "defense" the apparent reason the Court of Appeals finds no requisite intent.

The Health Commissioner used the paper Petitioner was forced to sign immediately to obstruct the investigation by US Senator Alfonse D'Amato.

An additional facet of Adolescent Obstetrics and Gynecology is prevention of child abuse and sexual abuse. As part of reproductive care petitioner acts as a prosecution expert.

The official complaints the Court of Appeals recognizes as suppressed are specific complaints originating from the core of reproductive care, and suppression of this complaints proves a special intent to interfere with this reproductive care. The Health Department intercepted Petitioner's reports on child abuse and sexual abuse. Petitioner took the matter to the New York State Supreme Court. Sharpe v. State of New York Department of Health. St. Lawrence County Index No: 102997. At the conclusion of the matter, the Petitioner was found responsible for filing reports on child abuse and sexual abuse. This was December 18, 1998, a year and a half after the licensing action. The Defendant-Appellees abrogated their defense with this conduct, and Petitioner achieved through court the solution of a few abuse cases.

Throughout the years following the destruction of the Maternity Service in the hospital the Defendants never made an attempt to reconcile with the adolescents they threw out. These pregnant adolescents are still present in town but if they chose to deliver their babies they avoid E.J. Noble Hospital.

When the first mother was killed on January 15, 2000 the pathologist Phillip Bridgman, M.D. noting the severe internal injuries the mother suffered in the Defendant-Appellees' hands asked for a forensic autopsy. Bridgman was removed from the hospital and his practice was seized by State University physicians.

When the second mother was inflicted with the gas gangrene bacterium the state physicians produced false laboratory reports indicating Hyperthyroidism, and placed the mother on antithyroid medication to cover the symptoms.

When Petitioner took the mother out of the Defendant-Appellees' hands the patient demanded a repeat of the test now known as false. The subsequent test even in the Defendant-Appellees' own proved the first set a fraud.

Throughout the years following the destruction of the Maternity Service, the state physicians never made an attempt to reconcile with the mothers in Gouverneur and their care givers.

The New York State Department of Health is embraced in a losing battle with the State of Vermont for the maternity care in the region. The State of New York is losing. The majority of pregnant women when in need of treatment in higher level facility selects the University of Vermont.

Throughout the years following the destruction of maternity care the Health Department never attempted to reconcile with pregnant women in the area or their care givers. The State continued a senseless witch hunt against reproductive care providers. The Health Department forced out Raoul Artal, M.D. the Professor of Ob/Gyn at SUNY Syracuse Health Science Center, now SUNY Upstate Medical University. Artal has never been replaced with comparably capable specialist Dr. Innamorati's application for joining the E.J. Noble Hospital was made in 1995. Since then, the application is in a drawer of the defendant-appellees, who refused even to talk to him.

As mentioned above two mothers were infected with the gas gangrene bacterium.

The gas gangrene bacterium is a weapon of mass destruction.

All maternal infections with the gas gangrene bacterium are reported worldwide, even in developing countries.

In addition all gas gangrene cases are reported and also published in Medical Journals. It is Petitioner's responsibility to report and publish the two cases.

REASONS FOR GRANTING THE PETITION

The Court of Appeals acknowledges, that the Defendant-Appellees caused injuries. All the injuries were inflicted specifically on pregnant mothers, seeking reproductive care, and their care providers. The Defendant-appellees continue to inflict injuries and their specific target is pregnant women seeking reproductive care. That should satisfy the specific intent requirement even against Defendant-Appellees refusal of admission. and the case should go ahead after filing an amended and supplemented complaint. The Second Circuit upheld a civil suit against the Health Commissioner, DiBlasio v. Novello 344 F.3d 292 (2d Cir. 2003) Cert. Denied Novello v. DiBlasio 2004 U.S. LEXIS 2770 (U.S. April 19, 2004)

DATED: January 9, 2005.

Respectfully submitted:

Thomas Sharpe, M.D.

Thomas Sharpe, M.D.
Petitioner pro se
P.O.B. 127
Gouverneur, NY 13642
Tel: (315) 287 - 7553

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2003

Argued March 4, 2004 Decided October 15, 2004

Docket Nos. 01-7044, 01-9019

THOMAS SHARPE, M.D.,

Plaintiff-Appellant,

—against—

CHARLES P. CONOLE, ROBERT LEADER, R. MIKE LAWLER, VIRGILIO RIGOR, DONALD SCHUESSLER, M.D., JANUSZ MROZ, M.D., STEVE BURKHART, M.D., SUNY SYRACUSE HEALTH SCIENCE CENTER, NYS DEPT OF HEALTH, BARBARA DEBUONO, M.D., Commissioner, MARTHA ELLEN, also known as Martha Allen, WATERTOWN DAILY TIMES, VIJAY KUMAR, M.D., and JUDITH J. CHOATE, Administratrix of the Estate of John W. Choate,

Defendants-Appellees,

JOHN W. CHOATE,

Defendant.

Before:

WALKER, *Chief Judge*, LEVAL, *Circuit Judge*, and GLEESON, *District Judge*.[1]

---

[1] The Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

Pro se plaintiff Thomas Sharpe appeals from a judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, District Judge), granting defendants' motions to dismiss and for summary judgment. The judgment is affirmed.

THOMAS SHARPE, pro se.

ANDREA OSER, Assistant Solicitor General for the State of New York (Eliot Spitzer, Attorney General of the State of New York; Caitlin J. Halligan, Solicitor General; Daniel Smirlock, Deputy Solicitor General), Albany, New York, for Defendants-Appellees SUNY Syracuse Health Science Center, NYS Dept. of Health, Barbara DeBuono, M.D., Steve Burkhart, M.D., and Judith J. Choate, and Defendant John W. Choate.

MARK J. SCHULTE, Hancock & Estabrook, LLP, Syracuse, New York, for Defendants-Appellees Charles P. Conole, Robert Leader, Virgilio Rigor, Donald Schuessler, M.D., Vijay Kumar, M.D., R. Mike Lawler, and Janusz Mroz, M.D.

S. PAUL BATTAGLIA, Bond, Schoeneck & King, LLP, Syracuse, New York, for Defendants-Appellees Martha Ellen and Watertown Daily Times.

JOHN GLEESON, *United States District Judge*:

Pro se plaintiff Thomas Sharpe appeals from the district court's judgment dismissing his action. The complaint under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE Act"), was based on various alleged acts of the defendants, including harassment of Sharpe and his patients, interference with patient care and education, suspension of Sharpe, and revocation of his medical license. For the reasons stated below, the judgment of the district court is affirmed.

BACKGROUND

Sharpe was a physician specializing in obstetrics and gynecology at E.J. Noble Hospital (the "Hospital"), in Gouverneur, New York, beginning in 1994. On May 22, 1996, Sharpe's privileges were suspended at the Hospital pending a New York State Department of Health investigation. Sharpe appealed the suspension in state court. After an administrative review by the state court, Sharpe's privileges were permanently suspended and he surrendered his license to practice medicine in New York on June 11, 1997.

Sharpe then brought this action, alleging that, on various occasions, the defendants violated the FACE Act, and conspired to do so, by, inter alia, (1) interfering with his ability to perform amniocenteses and ultrasounds, and his ability to properly care for his patients; (2) stealing or misdirecting patient records; (3) preventing childbirth education at the Hospital; (4) blocking Sharpe's access to his patients and the hospital, including equipment and staff necessary for training, and blocking his patients' access to the hospital for reproductive care and testing; (5) stalking

and harassing his patients, including pressuring them to transfer to other physicians; (6) coercing the medical staff to drop objections to the obstruction of medical care in the Hospital; (7) retaliating against him for his official complaints and/or suppressing complaints; and (8) causing him to be removed from the medical staff at the Hospital.

DISCUSSION

I. *The Standard of Review*

We review the district court's grant of defendants' motions to dismiss and for summary judgment de novo. *E.g.*, *Brody v. Vill. of Port Chester*, 345 F.3d 103, 108 (2d Cir. 2003) (summary judgment). Because Sharpe's complaint was filed pro se, we construe it broadly and interpret it to raise the strongest arguments it suggests. *E.g.*, *Weixel v. Bd. of Educ.*, 287 F.3d 138, 146 (2d Cir. 2002). For purposes of the motions to dismiss, we accept as true the allegations in Sharpe's complaint. *E.g.*, *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 672-73 (2d Cir. 1995). As to summary judgment, in determining whether a genuine issue of material fact exists, we resolve all ambiguities and draw all factual inferences in favor of Sharpe. *E.g.*, *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999).

II. *The FACE Act Claim*

We have carefully reviewed Sharpe's contentions on appeal and find them to be without merit. We write only to address the motivation required by the FACE Act. In granting summary judgment for the defendants on December 7, 2000, the district court held that to state a claim under the FACE Act, Sharpe had to allege, inter alia, that

the defendants intentionally used force to obstruct access to a reproductive health facility "because the interfered-with person is or has been obtaining or providing reproductive health services, or in order to intimidate such person or any other person or class of persons from obtaining or providing reproductive health services." *Sharpe v. Conole*, 123 F. Supp. 2d 87, 88 (N.D.N.Y. 2000). In so holding, the district court rejected Sharpe's argument that the only intent required to state a claim under the FACE Act was the intent to obstruct and interfere. *Id.* at 89.

The FACE Act provides that whoever

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the penalties [provided for in the Act].

18 U.S.C. § 248(a)(1). Therefore, by its very terms, the FACE Act requires that a defendant act *because* the interfered-with person was seeking, obtaining, or providing, or had obtained or provided, or might obtain or provide, reproductive health services. The intent to injure, intimidate, or interfere is a separate intent requirement that must also be proved by a FACE Act plaintiff. But that intent alone will not suffice to make out a claim under § 248(a)(1) without a showing that the intent to injure, intimidate, or interfere existed because of the motivation specified by the statute. Our precedent is consistent with this plain reading of the statute. *See New York v. Operation Rescue Nat'l*, 273 F.3d 184, 194 (2d Cir. 2001) (noting no

dispute that defendant's actions were "motivated by the fact that the clinics provide[d] reproductive health services"); *United States v. Weslin*, 156 F.3d 292, 298 (2d Cir. 1998) ("No matter what their ultimate purpose in blockading the clinic may have been, the defendants do not deny—nor could they plausibly deny—that they meant to block the entrances to the Planned Parenthood clinic . . . and that they did so because they wished to prevent the clinic from performing abortions.").

Here, Sharpe did not allege that the defendants obstructed or interfered with his provision of reproductive services because Sharpe provided such services. Sharpe's claim under § 248(a)(1) must therefore fail.

CONCLUSION

For the foregoing reasons, the judgment is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS SHARPE, M.D.

Plaintiff 99-CV-0971

- against -

CHARLES P. CONOLE; ROBERT LEADER MIKE LAWLER; VIRGILIO RIGOR, M.D.; VIJAY KUMAR, M.D.; DONALD SCHUESSLER, M.D.; STEVE BURKHART, M.D.; SUNY SYRACUSE HEALTH SCIENCE CENTER; NEW YORK STATE DEPARTMENT OF HEALTH; BARBARA DEBUENO, M.D. Commissioner; MARTHA ELLEN; and WATERTOWN DAILY TIMES

Defendants

Appearances: Of Counsel

Thomas Sharpe, M.D. Thomas Sharpe,M.D
P.O.Box 127
27 West Barney St.
Gouverneur, NY 13642
Appearing Pro Se

Hancock & Estabrook LLP Mark J. Schulte , esq.
P.O.Box 4976
1500 MONY Tower I
Syracuse NY 13221
For defendants

MEMORANDUM- DECISION
& ORDER

McAvoy, D.J.

In a prior Decision & Order familiarity with which is assumed the Court set forth the factual and procedural background of this action. See Sharpe v. Conole, 99-CV-971, March 31, 2000, Dkt. No: 70. *1

---

*1 In that decision the Court, inter alia, dismissed the complaint against Defendants Lawler, Mroz, DeBueno, Choate, Burkhart, SUNY Syracuse Health Science Center The New York State Department of Health, the Watertown Daily Times and Martha Ellen.

*2 As defendants note, the Court considered the applicable statute of limitations in a prior Decision & Order and determined that the correct statue of limitation for this action is four years. See Sharpe v. Conole, 99-CV-971. March 31, 2000, Dkt. No. 70. Local Rule 7.1 (g) governs motions for reconsideration or reargument of orders that are not final. Local Rule 7.1 (g) provides that such motions must be served no later than 10 days after the entry of the challenged judgment. This motion was filed September 12, 2000, several months after the Court rendered a decision on the statute of limitations issue. Thus, Defendants' motion for reconsideration of the statute of limitations is time barred and will not be considered by the Court.

Presently before the Court is Defendants Conole, Leader, rigor, Kumar and Schuessler's motion pursuant to Fed. R. Civ. P. 12(c) to dismiss the remaining causes of action under the Freedom of Access to Clinic Entrances Act of 1994, 18 USCS # 248, ("FACE") for the following reasons: (1) the Complaint fails to state a cause of action under FACE because it does not allege the requisite intent; (2) Defendants' participation in state mandated quality assurance programs provides them with immunity from the present claims; (3) the present action is barred by plaintiff's written release; (4) Plaintiff's claim should be barred by a one-year statute of limitations. *2

Pursuant to Fed. R. Civ. P. 12(b)(6), the Court cannot consider the affidavits and exhibits submitted by both parties in support or in opposition to the instant motion without converting the motion to a motion for summary judgment. See e.g., Fonte v. Board of Managers of Continental Towers, Inc., 848 F. 2d 24 (2d Cir. 1990) On October 23, 2000, this Court issued an Order notifying the parties that it would convert the motion to dismiss to one of summary judgment. The Court further allowed the parties to submit additional materials in support or opposition to summary judgment within fourteen calendar days. The Court issued a second Order dated November 11, 2000 to ensure that plaintiff understood the potential ramifications of a summary judgment motion. Plaintiff submitted additional opposition papers in response to both orders. See Dkt. Nos. 100, 102, 103.

Accordingly the Court will consider the instant motion as a motion for summary judgment. In addressing the motion, the Court will apply the well settled standard for summary judgment, which need not to be reinstated here. See Roman v. Cornell Univ. 53 F. Supp. 2d 223, 232-33, (N.D.N.Y. 1999) Phipps v. New York State Dep't of Labor, 53 F. Supp. 2d 551, (N.D.N.Y. 1999) Riley v. Town of Bethlehem, 44 F. Supp. 2d 451 458 (N.D.N.Y.) 1999) Defendants first argue that claims against them should be dismissed because Plaintiff does not allege the intent necessary to set forth a prima facie case. To state a claim under 18 U.S.C. # 248 (a)(1), Plaintiff must allege three elements: use of threat of force or physical obstruction of a reproductive health facility; (2) that the obstruction intentionally injure, intimidate or interfere with persons ; and (3) that the defendant's actions be taken because the interfered with person is or has been obtaining or providing reproductive health services. See Unite States v. Balint, 201 F. 3d 928, 932 (7th Cir. 2000); 18 U.S.C. # 248.

Defendants argue, that although Plaintiff alleges that they acted with variety of unsavory motives (including improper financial gain, professional rivalry, personal animosity, the desire to find evidence for medical malpractice actions against Plaintiff, and intoxication, see Def. Mem. of Law at 5; see also Amended Complaint at pp. 2-3, 5-8; pp9-11 5-10, 13; pp 17-18, 2-7; p. 30, 3-7; pp 10-11, 10, 13; pp. 4-6, 20, 29.), Plaintiff's Amended Complaint does not allege that they were motivated by Sharpe's status as a provider of reproductive

care or a desire to deter people from receiving reproductive medical care. Without alleging this type of motivation, Defendants contend, Plaintiff has failed to state a claim.

Plaintiff responds that to prove intent under FACE he only needs to allege that a defendant intended to obstruct and interfere with the obtaining and provision of reproductive health services, see U.S. v. Weslin, 156 F. 3d 292, 298, (2d Cir. 1998) and that the Amended Complaint alleges such action. See Pl. Mem. of Law at 2.

In Weslin the Second Circuit upheld a criminal conviction under FACE based on a sit-down protest that blocked entrances to a clinic providing abortion services. Defendants appealed their conviction, arguing, inter alia, that they did not have the requisite mens rea, because their motivation was to save the lives of unborn children rather than interfere with reproductive services. See Weslin, 156 F. 3d at 298. The court recognized that the defendants "meant to block the entrance to the Planned Parenthood clinic... and they did so because they wished to prevent the clinic from performing abortions" Id. The court therefore found that the actual motivation behind the Defendants' actions was irrelevant so long as they "intended to obstruct and interfere with obtaining and providing reproductive health services." Id; see also United States v. McDaniel, 175 F. 3d 1009, 1999 WL 177275, at *1 (2d Cir. Mar 26, 1999) (table) ("(The Weslin holding) follows from the statute itself, which proscribes interfering with a person's access to reproductive services 'because that person is or has been ...obtaining or providing reproductive services.'")
(internal citations omitted)

The cases relied on by Plaintiff are factually inapposite, they involve attempts to physically bar clinic entrances because those clinics provided reproductive services, the type of conduct FACE was enacted to address. See e.g. United States v. Hart, 212 F.3d 1067 (8th Cir, 2000) (parking Ryder trucks in front of abortion clinic in attempt to save unborn babies) ; McDaniel, 175 F3d 1009, 1999 WL 177275, at *1 (blockading clinic in order to prevent people from receiving and providing abortions); U.S. v. Operation Rescue Nat'l 111 F. Supp. 2d 948, 958 (S.D. Oh. 1999) (physically obstructed entrance to clinic); United States v. Wilson, 2 F. Supp. 2d 1170, 1171 (E.D. WI) (same), aff'd 154 F. 3d 658 (7th Cir. 1998), cert. denied, 525 U.S. 1081 (1999)

Moreover, Plaintiff's interpretation of Weslin to mean that he has to show only that Defendants actually interfered with or obstructed his provision of reproductive services rather than that they acted in this way because he provided such services, is incorrect. See 18 U.S.C. #248(a)(1); see also McDaniel, 175 F.3d 1009 1999 WL 177275, at *1 ("Defendants stipulated that their purpose in blockading the clinic was 'in order to prevent people from receiving and (the clinic staff) from providing abortions.' Defendants' actions therefore , fall squarely within the ambit of the statute.") U.S. v. Lynch, 162 F.3d 732 (2d Cir, 1998); Operation Rescue Nat'l 111 F. Supp. 2d at 958 ("Finally the legislative history and courts have noted that the phrase 'because that person is or has been ... providing reproductive services' requires that the (plaintiff) prove that the defendant's actions were motivated by the fact that a person is or has been obtaining or providing such services." (Citations omitted); Wilson, 2 F.

Supp. 2d at 1171 (finding that motivation of protecting unborn babies falls within the definition of "reproductive services" for purpose of FACE's intent element.)

Plaintiff's interpretation of FACE's mens rea standard (such that one only need show obstruction to prove intent) could lead to ridiculous results. For example, if a building housing medical offices providing reproductive services was condemned for public safety reasons such that access to the building was "obstructed, under Plaintiff's reading of the intent requirement, the individuals responsible for preventing individuals from entering the unsafe building could be found liable under FACE because they intended to keep medical providers and patients out of the building and, in doing so, interfered with immediate reproductive services. Similarly if a bomb threat required immediate evacuation of a reproductive clinic, individuals escorting patients and medical service providers out of the facility and/or preventing individuals from entering the facility could be liable under FACE. Contrary to Plaintiff's assertions , in this circumstances , the fact that an individual physically obstructed or literally interfered with provision of reproductive services would not suffice to establish a violation of FACE as the obstruction or interference was because of threat to patients and providers safety rather than because because the patients were receiving and the providers providing reproductive services.

In this case, Plaintiff has not alleged that Defendants obstructed or interfered with the provision of reproductive

services because Plaintiff provided such services (in fact Plaintiff alleges in part that his patients were unlawfully referred to other obstetricians or to providers in Syracuse, New York whom he considered inept), but rather the facts indicate that plaintiff was prevented from providing certain services due to hospital policy (amniocentesis procedures were done in Syracuse) and/or as part of a quality assurance program mandated by New York Law. *3 See N.Y. Educ. Law #6527; N.Y. Public Health Law ## 2805 j-m, 2807-i; N.Y. Mental Hyg. Law # 29.29; 10 N.Y. Code rules and reg. ## 405.6, 407.6 . In these circumstances, a reasonable fact finder could not find that Defendants' actions satisfy the intent element requirement of FACE.

The legislative history of FACE supports this decision, as well as the Court's interpretation of Weslin, 156 F. 3d at 298 regarding FACE's intent element. The legislative history is peppered with references to violence and examples illustrating that the purpose of the act is to prevent the growing violence accompanying the debate over the continued legality and availability of abortion and other reproductive services."

---

*3 As discussed in previous decisions of this case, E.J. Noble suspended Plaintiff's privileges on May 22, 1996, pending a State Department of Health investigation. Apparently Plaintiff's privileges were renewed on June 24, 1996, and then his inpatient privileges were suspended on July 7, 1996. Plaintiff surrendered his license to practice in New York on June 11, 1997.

H.R. Rep. No. 306, 103d Cong. 2d Sess. 6-7 (1994), reprinted in 1994 U.S.C.A.N. 699. The report states, "(i)n order to narrowly tailor this legislation to those activities found by the Committee to warrant new federal remedies, the act requires that the offender be motivated by the involvement of the victim or others in obtaining or providing reproductive health services" Id. at 709. The legislative history clearly indicates that Face was not enacted to address the prohibition of certain services by a medical provider pursuant to internal hospital regulations and/or quality assurance programs.

Plaintiff has provided no evidence that Defendants used force, threats of force, or physical obstruction to interfere with his provision of medical services because he is or was providing reproductive health services. See, e.g., Balint 201 F. 3d at 932. Thus taking all inferences in favor of Plaintiff, a reasonable jury could not conclude that Defendants violated FACE. Accordingly Defendants" motion for summary judgment is GRANTED and Plaintiff's Amended Complaint is dismissed in its entirety.

III. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED and Plaintiff's Amended Complaint is dismissed in its entirety.

IT IS SO ORDERED.

December 7, 2000.
Binghampton, New York

" S "

Hon. Thomas J. McAvoy
U.S. District Judge

(2)

Supreme Court, U.S.
FILED
MAR 17 2005
OFFICE OF THE CLERK

No. 04-1130

In The Supreme Court of the United States

THOMAS SHARPE, M.D.,

Petitioner,

v.

CHARLES P. CONNOLE, ROBERT LEADER, MIKE LAWLER, VIRGILIO RIGOR, M.D., DONALD SCHUESSLER, M.D., JANUSZ MROZ M.D., STEVE BURKHART, M.D., SUNY SYRACUSE HEALTH SCIENCE CENTER, NYS DEPARTMENT OF HEALTH, BARBARA DEBUENO, M.D., COMMISSIONER, MARTHA ELLEN, WATERTOWN DAILY TIMES, VIJAY KUMAR, M.D., AND JUDITH J. CHOATE, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CHOATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS JOHNSON NEWSPAPER CORPORATION AND MARTHA ELLEN IN OPPOSITION

S. PAUL BATTAGLIA ESQ.
BOND SCHOENECK & KING PLLC
One Lincoln Center
Syracuse, New York 13202
(315) 218-8277
Fax (315) 218-8100
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did Appellant have standing to sue the Johnson Newspaper Corporation and its reporter Martha Ellen for allegedly violating 18 U.S.C. § 248 in the course of their newsgathering activities involving interviewing women who sought reproductive care after closure of the only area hospital maternity ward in Ogdensburg, New York following a New York State Health Department investigation triggered by charges made against Appellant?

2. Did the District Court properly grant summary judgment to the Johnson Newspaper Corporation and Martha Ellen?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, S. Paul Battaglia and Bond Schoeneck & King PLLC state that the "Watertown Daily Times" is the trade name of a newspaper of general circulation published daily and distributed by the Johnson Newspaper Corporation, a privately held New York Corporation, throughout northern New York State. None of the shares of the Johnson Newspaper Corporation is held by a publicly traded company.

Pursuant to Supreme Court Rule 29.6, S. Paul Battaglia and Bond Schoeneck & King PLLC state that "SUNY Syracuse Health Science Center" is a publicly owned hospital created by Article 8 of the Education Law of New York State, and operated by the State University of New York.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

RELEVANT STATUTES AND REGULATIONS 1

COUNTER-STATEMENT OF THE CASE 6

ARGUMENT 9

POINT I

THE DISTRICT COURT PROPERLY AWARDED SUMMARY JUDGMENT BECAUSE APPELLANT LACKED STANDING TO SUE RESPONDENTS FOR ALLEGED VIOLATION OF 18 USC § 248 AND BECAUSE THEIR NEWSGATHERING ACTIVITIES WERE PROTECTED BY THE FIRST AMENDMENT 9

CONCLUSION 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bennett v. Spear, 520 U.S. 154 (1997) 11

Greenhut v. Hand, 996 F. Supp. 372 (D.N.J. 1998) 12

Lee v. Board of Governors of the Federal Reserve System, 118 F.3d 905 (2d Cir. 1997) 11

Lucero v. Trosch, 928 F. Supp. 1124 (S.D.Ala. 1996).... 13, 14

Lujan v. Defenders of Wildlife, 504 U.S. 553 (1992)..... 10, 11

Pashaian v. Eccelston Prop., Ltd., 88 F.3d 77 (2d Cir. 1996) 10

Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Live Activists (ACLA), 290 F.3d 1058 (9th Cir. 2001), *cert. denied*, 539 U.S. 958 (2003) 13, 14

U.S. v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996)..... 12, 13, 14

United States v. 27.09 Acres of Land, 1 F.3d 107 (2d Cir. 1993) 11

United States v. E. F. Vazquez, 145 F.3d 74 (2d Cir. 1998) 10, 11

United States v. Wilson, 154 F.3d 658 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999)..... 13

Valley Forge Christian College v. Am. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 10

FEDERAL STATUTES

FACE, 18 U.S.C. § 248 ..... *seriatim*

RELEVANT STATUTES AND REGULATIONS

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
CHAPTER 13 – CIVIL RIGHTS

§ 248. Freedom of access to clinic entrances [hereafter "FACE"]

(a) Prohibited activities. – Whoever –

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. – Whoever violates this section shall –

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. –

(1) Right of action. –

(A) In general. – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious

freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. –

(A) In general. – If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent –

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. –

(A) In general. – If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. – Nothing in this section shall be construed –

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. – As used in this section:

(1) Facility. – The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. – The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. – The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. – The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive

system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. – The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

COUNTER-STATEMENT OF THE CASE

Appellant, Thomas Sharpe, M.D., proceeding *pro se*, commenced this action on June 15, 1999, in the United States District Court for the Northern District of New York, alleging that the Respondents Johnson Newspaper Corporation, improperly sued as the "Watertown Daily Times," ("Johnson") and Martha Ellen ("Ellen"), and several co-defendants, violated FACE. After Appellant served an amended complaint pursuant to a Decision and Order dated August 6, 1999, Johnson and Ellen moved for summary judgment pursuant to Rule 56. On March 31, 2000, the Hon. Thomas J. McAvoy granted their motion and dismissed Appellant's causes of action against them. This appeal was taken from the Final Judgment entered by the District Court on December 7, 2000, which renewed the Court's prior orders and dismissed Appellant's Amended Complaint in its entirety. The complete procedural history is set forth in the Decision and Order dated March 31, 2000 and the Magistrate Judge's Decision-Order and Report-Recommendation dated March 23, 2000.

Appellant, formerly a licensed physician, had admitting privileges at E. J. Noble Hospital in Gouverneur, New York. He commenced this action alleging that Johnson and Ellen, and several other defendants, violated FACE by

preventing him from providing reproductive health services to pregnant teenage girls and other women. Appellant's Amended Complaint alleged that Johnson and its reporter, Ellen, published articles and engaged in activities that caused confusion and panic amongst pregnant teenage girls and other women, thereby preventing them from receiving reproductive health services. In his Amended Complaint, Appellant alleged that (i) certain articles written by Ellen and published in the Times suggested that pregnant women seek appointment with a physician who was working as Appellant's replacement following his surrender of his license to New York State. He also claimed that other unnamed reporters from the Johnson "stalked" pregnant girls and intercepted or otherwise interfered with their complaints, disrupted a meeting of women seeking reproductive care, an article written by Ellen "worsened the panic," and Johnson failed to warn women that they would not be able to obtain services from a particular physician.

Johnson and Ellen moved for summary judgment on the basis that Appellant had no standing to maintain a cause of action against them under FACE and that their activities both did not constitute a violation of the statute and were, in any event, protected by the First Amendment. On March 31, 2000, the Hon. Thomas J. McAvoy granted their motion for summary judgment. On December 7, 2000, Judge McAvoy resolved additional motions by other parties by dismissing Appellant's complaint as to those remaining defendants, and also issued a Final Judgment that was entered that same day.

On appeal to the Court of Appeals for the Second Circuit, that Court affirmed the decision below (2004 U.S. App. LEXIS 21479 (2d Cir. N.Y., Oct. 15, 2004) as to Johnson and Ellen, stating:

> "We have carefully reviewed Sharpe's contentions on appeal and find them to be without merit. We write only to address the motivation required by the FACE Act. In granting summary judgment for the defendants on December 7, 2000, the district court held that to state a claim under the FACE Act, Sharpe had to allege, inter alia, that the defendants intentionally used force to obstruct access to a reproductive health facility "because the interfered-with person is or has been obtaining or providing reproductive health services, or in order to intimidate such person or any other person or class of persons from obtaining or providing reproductive health services." *Sharpe v. Connole,* 123 F. Supp. 2d 87, 88 (N.D.N.Y. 2000). In so holding, the district court rejected Sharpe's argument that the only intent required to state a claim under the FACE Act was the intent to obstruct and interfere. *Id.* at 89."

The Court of Appeals found it unnecessary to address to Johnson's and Ellen's First Amendment right to gather news and decide whether Appellant's claim that their activities violated FACE passed constitutional muster.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY AWARDED SUMMARY JUDGMENT BECAUSE APPELLANT LACKED STANDING TO SUE RESPONDENTS FOR ALLEGED VIOLATION OF 18 U.S.C. § 248 AND BECAUSE THEIR NEWSGATHERING ACTIVITIES WERE PROTECTED BY THE FIRST AMENDMENT.

A. Lack of Standing.

Appellant failed to establish that he had the requisite standing to bring a claim against Johnson and Ellen under FACE. He could not establish a causal connection between their alleged conduct and any direct or indirect injury to him that proximately resulted in the violation of any right protected by FACE. His efforts to claim that others had suffered an injury by being confused or "misled" by Respondents' news stories stated no claim by Appellant himself that came within FACE. He does not fall within the "zone of interests" that Congress sought to protect when it enacted the statute.

Moreover, the Court of Appeals correctly concluded that, even if Appellant's factual allegations were true, he had failed to establish a *prima facie* claim under FACE against Respondents Johnson and Ellen because their conduct was not violent, did not threaten harm and did not have the motivation required by FACE to make their conduct actionable. Appellant's complaint did not allege, and he offered no proof below, that the alleged conduct by Johnson and Ellen about which he complained was motivated by a desire to prevent Appellant from providing

reproductive health services or because he was a provider of such services.

Consequently, Appellant had no standing to bring a claim against Respondents under FACE. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *United States v. E. F. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998); *Pashaian v. Eccelston Prop., Ltd.*, 88 F.3d 77, 82 (2d Cir. 1996). He could not, and did not, demonstrate any causal connection between Johnson's and Ellen's alleged conduct and the harm he claims to have suffered (he actually claimed the harm had been suffered by others, not by him, except to the extent that he allegedly "lost patients"). *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80; *Pashaian*, 88 F.3d at 82. To establish standing, Appellant had to show that his claim was based on a violation of his individual rights. *See Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982). He may not assert the rights of a third party to establish standing, nor may he predicate standing on a generalized grievance or an abstract injury to the rights possessed by every citizen. *See id.* The District Court correctly concluded that Appellant lacked standing to bring claims on behalf of his patients and other women who generally sought reproductive services.

As Appellant's claim could not be based on injuries sustained by others, he had to establish his standing to sue by demonstrating that (i) he had suffered an actual or threatened injury that is concrete and particular; (ii) there was a causal connection between the injury suffered and the allegedly illegal conduct of Johnson and Ellen; and (iii) his injury was likely to be redressed by a favorable decision of the Court. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80; *Pashaian*, 88 F.3d at 82.

Even if the Court had accepted as true Appellant's allegations that he suffered a loss of patients, a claim which is defeated by the fact that he voluntarily surrendered his medical license to New York State in 1997, he still failed to present a triable issue as to a causal connection between his purported loss of patients and the alleged conduct by Johnson and Ellen. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80.

According to his Amended Complaint, his alleged loss of patients resulted from the collaborative effort of the multiple defendants in this action to force his substitute physician, Dr. K, out of licensing on May 28, 1996. Even if Appellant did lose patients as a result of the actions taken against Dr. K, he does not have standing to maintain an action against Johnson and Ellen because their first allegedly wrongful act occurred on May 30, 1996, two days after Dr. K was allegedly "forced" out of practice. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80. Therefore, the Court of Appeals properly affirmed the dismissal of the complaint as regards Johnson and Ellen because the District Court lacked Article III jurisdiction. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80; *United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993) (appellate court has responsibility to satisfy itself that District Court had jurisdiction).

Also, Appellant failed to establish that he fell within the "zone of interests" that Congress sought to protect when it enacted FACE, as he was not a provider of reproductive services at E. J. Noble Hospital during the period in which Johnson and Ellen committed their allegedly wrongful acts. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Lee v. Board of Governors of the Federal Reserve*

System, 118 F.3d 905, 912 (2d Cir. 1997). Although Appellant's Amended Complaint does not clearly set forth how Johnson and Ellen interfered with his ability to provide reproductive health services in violation of FACE, the gravamen of his complaint seems to be that the alleged conduct of Johnson and Ellen caused confusion and panic which prevented pregnant women from receiving services at E. J. Noble Hospital. *See* Amended Complaint, ¶ 9 ("the article worsened the panic and led to severe losses to the whole hospital").

Even if the Court were to accept the allegations as true, the alleged wrongful conduct committed by Johnson and Ellen occurred between May 28, 1996 and July 11, 1996, after his admitting privileges at the hospital had been suspended on May 22, 1996. Thus, Appellant was not a provider of reproductive health services at the E. J. Noble Hospital within the meaning of FACE when Johnson and Ellen allegedly committed their allegedly wrongful conduct because he no longer provided assistance to the facility and its staff. *Cf. U.S. v. Dinwiddie*, 76 F.3d 913, 926-27 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996) (facility maintenance supervisor qualifies as "provider" for purposes of 18 U.S.C. § 248(a)(1) because his assistance is needed for physicians at clinic to do job); *Greenhut v. Hand,* 996 F. Supp. 372, 376 (D.N.J. 1998) (volunteer social worker qualifies as "provider" under FACE because she provides assistance to the facility's staff).

B. Lack of Proof of Required Motivation.

Appellant neither alleged nor offered proof below that Johnson or Ellen acted with the necessary intent to

commit a violation of FACE. *See* 18 U.S.C. § 248(a)(1); *United States v. Wilson*, 154 F.3d 658, 664 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999); *Dinwiddie*, 76 F.3d at 923.

The Court of Appeals found Appellant's contentions to be "without merit." The Court of Appeals undoubtedly agreed with the District Court that, as against Johnson and Ellen, the Amended Complaint failed to allege that they used force, threat of force, or physical obstruction to either intentionally injure, intimidate, or interfere with Appellant's activities because he provided reproductive health service. *See* 28 U.S.C. § 248(a); *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Live Activists (ACLA)*, 290 F.3d 1058 (9th Cir. 2001), *cert. denied*, 539 U.S. 958 (2003); *Lucero v. Trosch*, 928 F. Supp. 1124, 1130-31 (S.D.Ala. 1996).

In his Amended Complaint, Appellant alleges that: (i) articles published in the Johnson, written by Ellen, "suggested that pregnant women seek appointment [sic] with Dr. K. A well-timed move to break any resilience in these women. The immediate consequence was the death of Baby I . . . ," (ii) reporters from the Johnson "stalked" pregnant adolescent girls and intercepted or otherwise interfered with their complaint, (iii) Ellen disrupted a meeting of women seeking reproductive care and "with her continuous presence [and] continuous stalking effectively prevented these women from taking any action to regain their reproductive care, (iv) an article written by Ellen "worsened the panic and led to severe losses to the whole hospital," (v) Johnson "failed to warn pregnant women that they won't be able to obtain services from Mroz even

in emergency," and that (vi) "the confusion led to the death of another baby . . . the same kind of confusion the Johnson created amongst these girls a year before." Even accepting all of these allegations as true, the conduct of Johnson and Ellen does not constitute the type of violent or threatening behavior that is prohibited under FACE. *See Planned Parenthood, supra,* at p. 1074, FN.7, p. 1079, FN.14; *Lucero*, 928 F. Supp. at 1130-31.

Accordingly, even if Appellant's allegations regarding Johnson and Ellen were accepted as true, that alleged conduct did not violate FACE since none of their alleged conduct or speech can reasonably be interpreted as threatening violence. *See id.*; *cf. Dinwiddie*, 76 F.3d at 925 (finding violation of FACE where protester made threats of force that intimidated a physician by placing him in reasonable apprehension of bodily harm). Consequently, since the alleged conduct of Johnson and Ellen is not prohibited under FACE, Appellant's Amended Complaint fails to establish a *prima facie* cause of action under FACE against them. *See Planned Parenthood v. ACLA, supra,* at p. 1074, FN.7, p. 1079, FN.14; *Lucero,* 928 F. Supp. at 1130-31.

CONCLUSION

Respondents Johnson Newspaper Corporation and Martha Ellen respectfully submit that the Petition herein should be denied.

Respectfully submitted,

BOND, SCHOENECK & KING, LLP
S. PAUL BATTAGLIA
Attorneys for Respondents Johnson Newspaper Corporation, d/b/a "Watertown Daily Times" and Martha Ellen
Office & P.O. Address:
One Lincoln Center
Syracuse, New York 13202
Tel: (315) 218-8277
Fax: (315) 218-8100
Email: battags@bsk.com

(3)

No. 04-1130

Supreme Court, U.S.
FILED
APR 27 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS SHARPE, M.D.,

Petitioner,

v.

CHARLES P. CONOLE, ROBERT LEADER, MIKE LAWLER, VIRGILIO RIGOR, M.D., DONALD SCHUESSLER, M.D., JANUSZ MROZ, M.D., STEVE BURKHART, M.D., SUNY SYRACUSE HEALTH SCIENCE CENTER, NYS DEPARTMENT OF HEALTH, BARBARA DEBUENO, M.D., COMMISSIONER, MARTHA ELLEN, WATERTOWN DAILY TIMES, VIJAY KUMAR, M.D., and JUDITH J. CHOATE, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CHOATE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHARLES P. CONOLE, ROBERT LEADER, MIKE LAWLER, VIRGILIO RIGOR, DONALD SCHUESSLER, M.D., JANUSZ MROZ, M.D. AND VIJAY KUMAR, M.D.

JANET D. CALLAHAN
MICHAEL J. SCIOTTI*
HANCOCK & ESTABROOK, LLP
1500 MONY Tower I - P.O. Box 4976
Syracuse, New York 13221-4976
(315) 471-3151

Attorneys for Respondents
Charles P. Conole, Robert Leader, Mike Lawler,
Virgilio Rigor, Donald Schuessler, M.D.,
Janusz Mroz, M.D. and Vijay Kumar, M.D.

* *Counsel of Record*

194113

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Did the District Court properly dismiss Petitioner's causes of action against Respondents Conole, Leader, Rigor, Schuessler, Kumar, Lawler and Mroz under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE Act") on the ground that Petitioner failed to allege or offer proof of the motivation required by the FACE Act?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
RELEVANT STATUTES AND REGULATIONS	1
COUNTER-STATEMENT OF THE CASE	6
REASONS FOR DENYING THE PETITION	8
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Roe v. Aware Woman Center for Choice, Inc.,
357 F.3d 1226 (11th Cir. 2004) 11

United States v. Balint,
201 F.3d 928 (7th Cir. 2000) 9

United States v. Lynch,
162 F.3d 732 (2d Cir. 1998) 10

United States v. Operation Rescue National,
111 F. Supp. 2d 948 (S.D. Ohio, 1999) 10

United States v. Weslin,
156 F.3d 292 (2d Cir. 1998) 10

United States v. White,
893 F. Supp. 1423 (C.D. Cal. 1995) 9

United States v. Wilson,
2 F. Supp. 2d 1170 (E.D. WI.), *aff'd.* 154 F.3d 658 (2d Cir. 1998), *cert. denied* 525 U.S. 1081 (1999) 10

Cited Authorities

Page

FEDERAL STATUTES

Act of Oct. 22, 1993, Pub. L. No. 103-259, 1994 U.S.C.C.A.N. (103 Stat.) 699 9

H.R. Rep. No. 306, 103 D. Cong. 2d Sess. 6-7 (1993), reprinted in 1994 U.S.C.C.A.N. 699 10

FACE Act, 18 U.S.C. § 248 ..... *passim*

RULE

Fed. R. Civ. P. 12 (b)(6) 11

RELEVANT STATUTES AND REGULATIONS

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
CHAPTER 13 - CIVIL RIGHTS

§ 248. Freedom of access to clinic entrances [hereinafter "FACE Act"].

(a) Prohibited activities. – Whoever –

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. – Whoever violates this section shall –

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. –

(1) Right of action. –

(A) In general. – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First

Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. –

(A) In general. – If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent –

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. –

(A) In general. – If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. – Nothing in this section shall be construed –

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) **to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.**

(e) Definitions. – As used in this section:

(1) Facility. – The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. – The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. – The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. – The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or

referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. – The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

COUNTER-STATEMENT OF THE CASE

Petitioner, Thomas Sharpe, M.D., proceeding *pro se*, commenced this action on June 15, 1999 in the United States District Court for the Northern District of New York. He alleged that Respondents Conole, Leader, Rigor, Schuessler, Kumar, Lawler and Mroz (hereinafter "Respondents"), all of whom were either fellow physicians or administrators at E.J. Noble Hospital ("the Hospital") in Gouverneur, New York, where the Petitioner focused his obstetrical practice, violated the FACE Act. The Petitioner alleged that, in violation of the FACE Act, the Respondents intentionally obstructed his provision of reproductive health services and that their unlawful conduct was motivated by greed, professional rivalry, personal animosity and, in one instance, intoxication.

By Decision and Order dated August 6, 1999, District Court permitted the Petitioner to file an Amended Complaint, which the Respondents subsequently moved to dismiss on the ground that the Amended Complaint was fatally defective because it failed to allege that any of the conduct attributed to the Respondents was motivated by the Petitioner's status as a provider of reproductive health care services or by an intent to deter individuals from receiving reproductive health care services.

District Court notified the parties that it would convert the motion to dismiss to one for summary judgment, and allowed the submission of additional materials in support or opposition to that motion. District Court then granted dispositive relief to the Respondents.[1] The complete procedural history is set forth in District Court's Decision and Order dated March 31, 2000 and the Magistrate Judge's Decision-Order and Report-Recommendation dated March 23, 2000.

With respect to the facts underlying the action, the Petitioner was formerly a licensed physician specializing in obstetrics and gynecology with admitting privileges at the Hospital. On May 22, 1996, his privileges at the Hospital were suspended pending an investigation by the New York State Department of Health. The Petitioner appealed the suspension in State court. Following an administrative review, his privileges were permanently suspended and he surrendered his license to practice medicine in New York on June 11, 1997.

Petitioner then commenced this action, alleging that the Respondents had violated the FACE Act by, *inter alia*: (1) interfering with his ability to properly care for his patients and stealing or misdirecting patient records; (2) blocking his access to his patients and to the Hospital; (3) preventing childbirth education at the Hospital; (4) harassing and stalking his patients, including pressuring them to change

---

[1] District Court issued a Memorandum Decision and Order dated December 7, 2000 granting summary judgment to Respondents Conole, Leader, Rigor, Kumar and Schuessler (Docket No. 104) and a Decision and Order dated March 31, 2000 dismissing Petitioner's Amended Complaint as against Lawler and Mroz (Docket No. 70).

doctors; and (5) coercing the medical staff at the Hospital to drop objections made on his behalf to the interference with medical care at the Hospital.

Following District Court's dismissal of the Amended Complaint as against the Respondents, the Petitioner appealed to the Court of Appeals for the Second Circuit, which affirmed the Judgment of the District Court (2004 U.S. App. LEXIS 21479 [2d Cir. N.Y. Oct. 15, 2004]). In its Decision, the Second Circuit stated that, construing the Petitioner's Amended Complaint broadly; interpreting it to raise strongest arguments it suggested; accepting as true the allegations in the Amended Complaint; and resolving all ambiguities and drawing all factual inferences in favor of the Petitioner, it had reviewed the contentions of the Amended Complaint and found them to be without merit. The Court addressed the requisite allegation of intent to state a claim under the FACE Act and held that the Petitioner had not alleged the motivation required by the FACE Act.

REASONS FOR DENYING THE PETITION

DISTRICT COURT CORRECTLY CONCLUDED THAT PETITIONER FAILED TO ALLEGE THE SPECIFIC MOTIVATION REQUIRED TO STATE A CLAIM UNDER THE FACE ACT

The stated purpose of the FACE Act is

> to protect and promote the public safety and health in activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is

> intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

Act of Oct. 22, 1993, Pub. L. No. 103-259, 1994 U.S.C.C.A.N. (103 Stat.) 699. To state a civil claim under subsection (a)(1) of the FACE Act, a plaintiff must allege that a defendant: (1) used force or threat of force or physical obstruction of a reproductive health facility; (2) to intentionally injure, intimidate or interfere with or attempt to injure, intimidate or interfere with a person; (3) because the interfered-with person is or has been obtaining or providing reproductive health services or in order to intimidate such person or any other person or class of persons from obtaining or providing reproductive health services. *See United States v. Balint*, 201 F.3d 928, 932 (7th Cir. 2000); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995).

The final House Judiciary Committee report issued prior to the enactment of the legislation addressed the required element of motivation:

> Subsection 248 (a)(1) would cover acts of force, threats of force and physical obstruction that intentionally injure, intimidate, or interfere with any person, but only if those actions are undertaken because the victim or others are obtaining or providing reproductive health services. In order to narrowly tailor this legislation to those activities found by the Committee to warrant new federal remedies, the act requires that the offender be motivated by the involvement of the victim or others in obtaining or providing reproductive health services.

H.R. Rep. No. 306, 103 D. Cong. 2d Sess. 6-7 (1993), reprinted in 1994 U.S.C.C.A.N. 699. Hence, under the statute, conduct otherwise prohibited is not actionable absent an allegation and showing of the requisite motivation.

The Petitioner's Amended Complaint contained 21 paragraphs addressing the motivation of the Respondents. In his Amended Complaint, the Petitioner ascribed various motives to the Respondents, including greed, professional rivalry, personal animosity and intoxication. None of the allegations of the Amended Complaint, however, stated that any of the Respondents were motivated by either the involvement of the Petitioner in providing reproductive health services or the involvement of patients in obtaining reproductive health services. The various motives ascribed to the Respondents did not fall within the scope of the intent required by the FACE Act and, hence, were properly found to fail to state a claim under the FACE Act.

As was noted by the District Court in its Memorandum-Decision and Order dated December 7, 2000, the Petitioner's reliance on *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998) is misplaced. The Petitioner misinterprets *Weslin* as meaning that he had to show only that the Respondents actually interfered or obstructed his provision of reproductive services, not that their conduct was motivated by the fact that he provided such services. That interpretation is not supported by either the language of the statute itself or by case law. *See, e.g., United States v. Lynch*, 162 F.3d 732 (2d Cir. 1998); *United States v. Operation Rescue Nat'l*, 111 F. Supp. 2d 948 (S.D. Ohio, 1999); *United States v. Wilson*, 2 F. Supp. 2d 1170 (E.D. WI), *aff'd.* 154 F.3d 658 (2d Cir. 1998), *cert. denied* 525 U.S. 1081 (1999).

In *Roe v. Aware Woman Center for Choice, Inc.*, 357 F.3d 1226 (11th Cir. 2004), the 11th Circuit affirmed the District Court's grant of summary judgment in favor of the defendants dismissing a claim brought under the FACE Act. The dismissal was based on the fact that the record was devoid of any evidence that the defendants had the statutorily-required motive necessary to state a claim of a violation of the FACE Act. In that case, a prior action brought by the plaintiff had been dismissed by the District Court pursuant to Fed. R. Civ. P. 12 (b)(6) and the 11th Circuit remanded to permit the plaintiff to amend her complaint specifically to allege a claim under the FACE Act. She did so, following which the defendants moved for summary judgment dismissing the second complaint. District Court granted summary judgment to the defendants and, upon *de novo* review, the 11th Circuit affirmed.

The mere fact of an interference with or obstruction of the provision of reproductive services is insufficient to state a claim for a violation of the FACE Act. The conduct does not demonstrate the intent required by the statute. In this case, District Court provided the Petitioner with an opportunity to amend his Complaint to allege facts addressing motive. Petitioner availed himself of that opportunity and amended his Complaint, setting forth allegations of motive in detail. Specifically, in his Amended Complaint the Petitioner charged Respondents Conole, Leader, Rigor and Schuessler as being motived by financial gain in the form of kickbacks paid by Upstate Medical University Hospital for referring obstetrical patients that he presumes he would have otherwise treated. He charged Respondents Kumar and Schuessler as being motivated by professional rivalry and personal animosity fueled by his criticism of their medical practice. He charged Respondent Leader with being

motivated by a desire to find medical malpractice actions and alleged that Respondent Conole was motivated by the additional factor of his alleged personal intoxication. None of the motives he ascribed to the Respondents were sufficient to allege a FACT Act claim.

In addition, on the conversion of Respondents' dismissal motion to one for summary judgment, the Petitioner was granted additional time to assemble an evidentiary base for his alleged claim of a violation of the FACE Act. Instead, he simply reiterated his contention that an intent that would satisfy the requirements of the statute could be inferred by the mere showing of an interference or obstruction. The Petitioner's contention, that the only intent required to state a claim under the FACE Act is the intent to obstruct and interfere, without also alleging that the conduct was motivated by either his involvement in providing reproductive health services or the involvement of patients in obtaining reproductive health services, was properly rejected by District Court and by the Second Circuit. Since the Petitioner did not allege that the Respondents obstructed or interfered with his provision of reproductive services ***because*** he provided such services, his Amended Complaint did not state a viable claim under 18 U.S.C. § 248 (a)(1) and was properly dismissed.

CONCLUSION

Respondents Conole, Leader, Lawler, Rigor, Schuessler, Mroz and Kumar respectfully submit that the Petition herein should be denied.

Respectfully submitted,

JANET D. CALLAHAN
MICHAEL J. SCIOTTI*
HANCOCK & ESTABROOK, LLP
1500 MONY Tower I - P.O. Box 4976
Syracuse, New York 13221-4976
(315) 471-3151

Attorneys for Respondents
Charles P. Conole, Robert Leader, Mike Lawler, Virgilio Rigor, Donald Schuessler, M.D., Janusz Mroz, M.D. and Vijay Kumar, M.D.

* *Counsel of Record*

(4)

Supreme Court, U.S.
FILED
MAY 6 - 2005
OFFICE OF THE CLERK

Case No: 04-1130

==========

In the

Supreme Court of the United States

THOMAS SHARPE, M.D.

Petitioner

v.

CHARLES P. CONOLE; et al

Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

SUPPLEMENTAL BRIEF

THOMAS SHARPE, M.D.
PETITIONER PRO SE
P.O.B. 127
Gouverneur, New York 13642
Tel: (315) 287-7553

I. THE UNITED STATES HAS AN INTEREST

On May 4, 2005 Sharpe was informed by attorneys of the US Army JAG Corps that a civil action, at the United States District Court, Northern District of New York 7:04-CV-756 reached a settlement agreement, in round figure 1 million Dollars, before the Hon. Thomas J. McAvoy

The case was filed by serviceman David Bitters to recover damages due to the death of his Wife Pamela A. Bitters on May 31, 2003 at the University Hospital State University of New York, Syracuse.

Ms. Bitters a 27 years old female delivered a baby on February 1, 2003. She was followed by the Guthrie Clinic, at the Fort Drum Army Base, Home of the 10 th Mountain Division.

The Guthrie Clinic and the Fort Drum Army Base which is located in a short distance from Gouverneur New York, during the time mentioned in the petition, used Sharpe's service to deliver babies of service women and family members of servicemen. Since the respondents destroyed the maternity service in Gouverneur, the army left Gouverneur E.J. Noble Hospital, and babies were and are delivered in Samaritan Hospital Watertown, and Carthage Area Hospital Carthage, NY.

Since Sharpe had a very good working relationship with the army Sharpe remained a consultant for the army when things went wrong, like in the Bitters case.

Ms. Bitters delivered in Samaritan Hospital. After her delivery she had complaint of irregular bleeding and a number of vague complaints like headache and abdominal discomfort. She was followed at the Guthrie Clinic on the Army base after her discharge from the hospital. Her complaints got gradually worse, and finally on May 24 2003 she was admitted with the diagnosis of Choriocarcinoma to the University Hospital Syracuse. At the University Hospital under the care of Chad Hartley, M.D. resident physician she had a bilateral trepanation of her skull and died on May 31, 2003. Her chart was countersigned by attending physician David A. Carter, M.D. The autopsy showed a disseminated choriocarcinoma, which is a cancer arising from the cells of the placenta.

In the Army physicians immediately reviewed the case locally and in Walter Reed Hospital. The conclusion reached found the army physician negligent of causing delay in diagnosing the cancer. So the Army agreed to compensate the husband and the family.

All this leaves us with the question of the role of the State University and the University Hospital in this negligence.

First of all, choriocarcinoma is an obstetrical complication. There is no obstetrician of record from the State University.

Second: Agreed by all the treatment of choriocarcinoma is before all chemotherapy. special antitumor agent were developed for this cancer their administration does not

require brain surgery a nurse can administer them intra muscular route.

The State University of New York Syracuse runs two hospitals. Crouse Irving Hospital is a private hospital. The University Hospital is State. Obstetrics is in Crouse Irving Hospital, where faculty members of the University conduct their private practice. The Crouse Irving Hospital can be held liable for negligence. Much more difficult to bring the University Hospital to court, because of laws protecting the state against civil suits, and because the expert witnesses in the Central New York area as a rule come from the State University. Outsiders are not advised to challenge the University Hospital because faculty members are the witnesses used by the New York State Health Department against physicians.

In summary the paying private patients are admitted to Crouse Irving Hospital , while riskier cases wind up at University. The system cost dearly to Sharpe just like it cost the Army.

The State University which forces referrals to its faculty members from the Army does not have any prospective or retrospective discussion of cases and protocols with Army physicians. The situation of the Army physicians is the same a Sharpe's was

II. EVIDENCE AGAINST THE STATE DEFENDANTS.

Allegations against Steven Burkhart, M.D.

page 27, of the Amended Complaint:

7. Burkhart assaulted Patient "M" by giving out an opinion disregarding the patient's diabetes and high blood pressure. Meanwhile he conspired with defendant Choate to disable defendant Aubry to interfere. The result was a critical damage to both mother and baby. Patient "M" filed a suit because of her and her baby's damages

---

9. Plaintiff was actually killed by Burkhart and his codefendants Conole, Schuessler,Choate, Carone and Leader. Plaintiff still had a high number of patients deeply confused and utterly harassed by the defendants, and a group of patients severely injured by the defendants. The defendants distorted all complaints filed by the patients against the defendants, and noticing that the plaintiff can not keep up with the injured patients and the falsifications the defendants make about them, noticing that the plaintiff is getting sick and losing his resources, forced him to give up his license on June 11, 1997. Ten weeks later plaintiff was clinically dead in cardiac arrest.

Affidavit of Joanne Lasher Oleslager:
UNITED STATES DISTRICT COURT 7:99-CV-0971
NORTHERN DISTRICT OF NEW YORK
THOMAS SHARPE, M.D. Plaintiff v. CHARLES P. CONOLE et al.

Joanne Lasher Oleslager, being duly sworn deposes and says: 1. Deponent has a B.S. degree in Community and Human Science, from SUNY Empire State College

and she is a religious counselor. She also had a small job at E.J. Noble Hospital, Gouverneur, NY. 1996-1997.

2. Pregnant adolescent girls have been abused by the hospital and its administrator in 1996-97 by being locked out of reproductive care

3. The hospital blocked the access of the girls to reproductive care. Martha Ellen of the Watertown daily Times referred the girls to inactive physicians.

3. Deponent and other concerned people tried to report the to the Social Services Child Protective Unit. Soon they found out that the Child Protective Hotline is not effective against the hospital. On the hotline a reporter was simply told that the report has to be made to the Health Department.

4. Reports were now sent to the Health Department, but those were not answered. The Hotline now advised to contact legislators or the Governor.

5. The babies dying and getting injured, deponent contacted U.S. Senator Alfonse D'Amato and Governor Pataki. Exhibit 1.

6. The Senator started an investigation, the Governor only promised. Exhibit B.

7. Soon after the Senator contacted the hospital administrator and the Health Department, deponent's personal medical records were altered in the hospital. A brain tumor was included in her history. (She never had one.)

8. She was treated like inferior and incompetent, she was personally searched and told that she has no more job in the hospital.

9. In addition to the abuse of pregnant children, a different kind of abuse threatened all women: Intrusion of their privacy by the administrator. A complaint describing an intrusion of a pregnant laboring patient is described in the annexed complaint Exhibit C.

/signature/

March 14, 2000
Sworn to:
14th day of March
Barbara A. Finnie
Notary Public.

Joanne Lasher Oleslager
1443 U.S. Hwy 11 Lot No. 19.
Gouverneur, NY 13642
Tel: (315) 287 - 7653

III. SUMMARY OF ARGUMENTS.

Both the legislative history and the second Circuit decisions are clear on the intent element.

If the offender intends to commit the offense and if he or she knows the natural and probable consequences, the intent element is satisfied.

Here the offenders don't deny that they intended to commit the offenses. The offenders can not deny that they knew that the natural and probable consequences of their actions will be forceful obstruction of provision or seeking of reproductive care and physical injury to those seeking and providing reproductive care.

We also refer to the "administrative review by the State Court." The same judge who presided over this "review" upheld the Legal Malpractice suit Sharpe filed against the attorney representing Sharpe during this "review"

This Supplemental Brief is respectfully submitted

DATED MAY 6, 2005

Thomas Sharpe, M.D.
Petitioner
P.O.B. 127
Gouverneur, NY 13642
Tel: (315) 287 - 7553